United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2129

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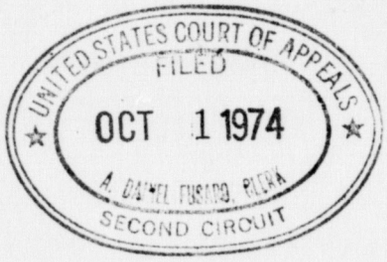
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. JOSEPH POWELL, Petitioner-Appellant, -against- THE HONORABLE J. EDWIN LaVALLEE, Superintendent, Clinton Correctional Facility, Dannemora, New York, Respondent-Appellee.	Docket No. 74-2129

BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM A DENIAL OF A PETITION FOR WRIT OF HABEAS CORPUS BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether the police lacked probable cause to believe a crime was occurring when they broke into Apartment 3-H at 1874 Loring Place, arrested appellant Powell and fourteen other persons, and seized various evidentiary items.

2. Whether the failure of the police to obtain a valid search warrant before raiding the apartment in question invalidated the seizure of the materials found therein.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (The Honorable Dudley B. Bonsal) rendered on June 6, 1974, denying appellant Powell's petition for a writ of habeas corpus. In that same order the District Court granted a certificate of probable cause and leave to proceed in forma pauperis. This Court assigned the Federal Defender Services Unit of The Legal Aid Society to represent Powell on his appeal.

Statement of Facts

On January 23, 1970, New York City police officers acting pursuant to a "no knock" search warrant broke into Apartment 3-H at 1874 Loring Place, Bronx, New York, arrested appellant Powell and fourteen other persons, and seized a quantity of drugs and other paraphernalia. The police entered the apartment by using a crowbar to force open a bedroom window (117*).

Prior to trial, Powell and his co-defendants moved to suppress the seized evidence on the ground that it had been obtained as a result of an unconstitutional search and seizure.

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*Numerals in parentheses refer to pages of the transcript of the hearing.

At the conclusion of a hearing on that motion, the trial court granted the motion. On appeal, however, the trial court was reversed by the Appellate Division in a divided opinion. The New York Court of Appeals affirmed the Appellate Division, also in a divided opinion.

Thereafter, Powell pleaded guilty to the charge of criminal possession of a dangerous drug in the first degree, and was sentenced to imprisonment for a term of eight and one-third to twenty-five years, which he is presently serving at Clinton Correctional Facility, Dannemora, New York.

During the suppression hearing, the District Attorney conceded that the affidavit on which the search warrant had been based was legally insufficient and that the search warrant was therefore void (344). He argued that, nonetheless, the police had the requisite probable cause to conduct a warrantless search of the raided premises.

A. The Search Warrant

The courts which have considered this case have agreed, with the State's concession, that the "no knock" search warrant with which the police were armed when they broke into the apartment at Loring Place was void (350). These courts held that the affidavit* on which the warrant was based provided no factual basis for the anonymous informant's claims

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*The affidavit is set forth in appellant's separate appendix as E.

(350-51). Moreover, not only was the informant of unproven reliability, he was of proven unreliability (378; see also 350-51). The dissenting opinion in the Appellate Division best describes the basis for this finding of unreliability:

> At the hearing it was established that the informant was unreliable. While three defendants had been arrested in one case on [the informant's] information, no convictions had resulted. Furthermore, the evidence shows that just one week before Strano applied for the warrant, the same informant had given the police erroneous information and that he had confessed to Strano that he did not know "what had happened," i.e., why his information had been incorrect.
>
> People v. Powell, 36 A.D.2d 177, 184, fn. Emphasis in the original.

B. Corroboration

The only information provided by the informant was his unsubstantiated claims that two of Powell's co-defendants, Beverly Massey and Naomi Bostick, were drug "mill" operators, that they were occasionally seen in the company of women dressed in men's clothing, that Beverly Massey was using the apartment of one "Tessie" at 1874 Loring Place, and that Massey would be operating a drug mill there on January 23, 1970 (265-69). Previously the informant had similarly claimed that a mill operation would take place at 866 Elsmere Place, but no such operation occurred (267).

At the suppression hearing the State sought to bolster the informant's claims with certain events and police observations (42). Thus, the State referred to the arrest of Naomi Bostick at 1764 Walton Avenue on October 29, 1969, for possession of drugs (261-62). However, that case remained untried at the time of the raid of the Loring Place apartment, and the informant had no connection whatsoever with Bostick's arrest (84).

The State also looked for corroboration to the fact that an anonymous telephone caller and Pat Jackson, who was arrested with Naomi Bostick, had claimed that Bostick and Beverly Massey were "mill girls" (42, 106). However, although the police had maintained surveillance on Beverly Massey's apartment at 866 Elsmere Drive during certain periods between October 23, 1969, and the raid of the Loring Place apartment on January 23, 1970, they testified that they saw only that Bostick, Massey, and several other females, some wearing men's clothing, entered and left the apartment building on various occasions (53, 65). On the morning of the raid, the police observed Bostick, Massey, and several other females, some of them wearing men's clothing, entering the apartment at Loring Place (112-13). The police also observed Powell drive up in front of the building, park, and then stand looking around until Massey came out of the apartment building, met him, and helped him carry a suitcase, a shopping bag, and a cardboard box from the trunk of the car into the building (325-26).

The police testified that there was nothing unusual about any of these three items (332-33). The police also observed Naomi Bostick arrive carrying two shopping bags, which the police observed contained food (113-14).

Just prior to raiding the apartment the police listened outside the door of the apartment, but heard only female voices. The agents testified only that they heard the statements, "Hey, Chalky" (Massey's nickname) and "hey, Beverly, is the food ready?" (341).

At the conclusion of the suppression hearing, the trial court held that the search warrant was invalid because the underlying affidavit lacked sufficient reliable information to establish probable cause. The trial court further held that even the additional information known to the police at the time the warrant was issued but not included in the underlying affidavit together with their observations after the warrant was issued but before the raid took place did not contribute sufficiently to the affidavit to raise the total information in the possession of the police at the time of the raid to the level of probable cause. Concerning the warrant and the underlying affidavit, the trial court held:

> ... [I]n stating that the warrant was based on insufficient affidavit, I stated that as far as whatever information the officers had up to the 23rd, up to the time that is they obtained the warrant, that is, was mere suspicion and nothing else; as far as the informant's information is concerned, that was a mere

> tip. There is nothing substantial in that information. The informant didn't say how he or how she obtained the information, whether she was, he or she was -- ever present in the apartment or saw anything, and as far as the officers were concerned there was nothing that any of these officers said that buttressed the suspicion that illegal activities were going to take place there. As police officers, they had a right to suspect but that is not sufficient. That doesn't constitute probable cause.... I think that I have already stated that in my opinion the informant was unreliable.
>
> (365-66, 368; see also 360-62, 378-83).

The court also found that, even considering all knowledge the police possessed at the time the warrant was issued, including information not set forth in the affidavit supporting the warrant, the police still lacked probable cause as of that time to conduct a search of the apartment (353-55). Even the State conceded this fact, stating:

> ... I don't think that we [the State] can take the position at this time as of January 22, 1970 [when the search warrant was issued], that these officers had sufficient probable cause to arrest these defendants without a warrant.
>
> (353-54; see also the subsequent statements of the District Attorney at 354).

The court then examined the additional observations which the police made before they conducted the raid. When the prosecutor argued that the informant's claim that Beverly Massey

had obtained the Loring Place apartment to operate a drug mill had been corroborated by the police observations, the trial judge responded:

> [The police] didn't corroborate the fact that [Massey] rented the apartment for any purpose. All they knew was that [the informant] said that.... There is nothing to stop an informant to go to a house, pick out a name in a doorbell and come up and say so and so is carrying on illegal activities in that apartment.
>
> (367).

The prosecutor then argued that the fact that Bostick and Massey, two of the persons seen entering the apartment building on January 23, 1970, were reputed mill operators, and that Bostick had been arrested for drug possession the previous October, constituted corroboration of the informant's claim that a mill was operating in the Loring Place apartment on January 23, 1970. To this argument the trial court responded that such information

> ... doesn't mean that every house she went into was of necessity a mill.
>
> (368).

The court also found that the fact that Bostick and Massey had been observed previously and on the morning of the raid wearing men's clothing had no significance on the issue of probable cause (370-72). The court then pointed out that the police had no prior information about Powell, implying that the mere

fact that he was observed carrying a suitcase, shopping bag, and cardboard carton into the apartment building would not support the policemen's conclusion that these items contained drugs (374). After further argument, the court concluded by saying that for the reasons stated during the course of the argument it had to conclude that all the knowledge the police officers had testified they possessed at the time of the raid "is not sufficient to provide a basis for a finding of probable cause..." (383). Consequently, the court granted the defendants' motion to suppress.

The holding was reversed, however, by the Appellate Division, First Judicial Department, with two judges dissenting. 36 A.D.2d 177 (1971). The majority held merely that the information in the possession of the police at the time of the raid did constitute probable cause for a warrantless search. The dissenting judges agreed with the trial court, saying that since the claims made by the informant were unreliable, the mere fact that activity consistent with those claims took place did not provide probable cause where, as here, there was nothing "unusual" about that activity. The dissenting judges also found that there was no requisite "emergency" to justify a warrantless search. The Appellate Division's decision was then affirmed by the New York Court of Appeals without opinion. 30 N.Y.2d 634 (1972). Judge Fuld dissented, relying on the dissent in the Appellate Division.

C. The Holding of the Federal District Court

The Federal District Court, in denying Powell's petition for writ of habeas corpus,* disagreed with the trial court and found instead that there had been sufficient corroboration of the informant's claims to give the police probable cause to raid the apartment. In so holding, the court found that the informant's claim that a mill would be operated in the Loring Place apartment on January 23, 1970, was sufficiently substantiated by:

(1) the fact that the informant knew that someone named Tess had an apartment at the Loring Place building which the informant claimed had been "used" before. The police, by examining the mailbox in the building, found that the apartment was leased by one Tessie Truhart;

(2) the fact that Massey and Bostick, two individuals who had prior records for narcotics violations, were seen entering the apartment on January 23, 1970;

(3) the fact that on the morning of January 23, 1970, Powell drove up and parked near the Loring Place building, emerged, walked to the rear of the car and stood there looking up and down the street until Massey came out, helped him remove a shopping bag, suircase, and cardboard box from the trunk and carry them into the building. This was allegedly a pattern which these police officers recognized in "mill" cases;

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*The District Court's opinion is set forth in appellant's separate appendix as B.

(4) the fact that numerous females, some known to be associates of Bostick and Massey and some wearing men's clothing, were seen entering the building or the apartment; and

(5) the fact that the police overheard female voices coming from the apartment, including someone addressing "Chalky" and "Beverly." (Id. at 10-13). The District Court also held that the fact that the policemen's entry into the apartment was unannounced was justified by "exigent circumstances," including a large number of people, the possibility of destruction of evidence, and considerable risk to the policemen's physical safety. (Id. at 14).

ARGUMENT

I

THE POLICE LACKED PROBABLE CAUSE TO BELIEVE A CRIME WAS OCCURRING WHEN THEY BROKE INTO APARTMENT 3-H AT 1874 LORING PLACE, ARRESTED APPELLANT POWELL AND FOURTEEN OTHER PERSONS, AND SEIZED VARIOUS EVIDENTIARY ITEMS.

The search which appellant Powell challenges in this proceeding was made pursuant to a "no knock" search warrant which the State has conceded, and all the courts to consider this case to date have found, was constitutionally void. The affidavit in support of the warrant contained the allegation that the apartment to be raided was being used by a person who had previously been observed in conversation with "known narcotics violators." Except for this single assertion of objective fact, the affidavit recited only conclusory claims of an unnamed informant. The affidavit was totally devoid of any assertion that the informant's claims were based on the informant's own observations or on information obtained by the informant in a reliable way. Moreover, the informant himself was not merely an individual of unproven reliability: it was, in fact, established that he was unreliable. The dissent in the Appellate Division best describes the basis for the trial court's finding of the informant's unreliability:

> At the hearing it was established that the informant was unreliable. While three defendants

> had been arrested in one case on his information, no convictions had resulted. Furthermore, the evidence shows that just one week before Strano applied for the warrant, the same informant had given the police erroneous information and that he had confessed to Strano that he did not know "what had happened," i.e., why his information had been incorrect.
>
> People v. Powell, 36 A.D.2d 177, 184 (dissenting opinion). (Emphasis in the original).

Since the warrant was concededly void, the State took the position that the search was justified because there was probable cause to search. To sustain the search on this theory, the two-prong test of Aguilar v. Texas, 378 U.S. 108, 114 (1964), must be applied. Spinelli v. United States, 393 U.S. 410, 413-15 (1969). Under that test, (1) the informant whose information was relied upon must demonstrate that his assertions were based on information obtained in a reliable way and (2) the police must possess sufficient independent evidence that the informant himself is reliable. As the trial court found, based on the State's concession and the evidence introduced at the hearing, both prongs of the test remained unsatisfied in this case. Here, there was no indication of how the informant got his information. There were not even any assertions by the informant relating to his personal observations or conversations with one or more of the defendnats. See, e.g., Spinelli v. United States, supra, 393 U.S. at 416; United States v. Sultan, 463 F.2d 1068 (2d Cir. 1972).

Moreover, as previously stated, the informant in this case was not merely of unproven reliability; rather, he was of proven unreliability. The State failed to establish his reliability by showing either that previous information given by him had led to convictions (Aguilar v. Texas, supra) or that his information in this case constituted a declaration against his penal interests. United States v. Harris, 403 U.S. 573, 583 (1971). Moreover, information this informant had previously given to the police turned out to be unreliable (see hearing transcript at 373, 267; see also People v. Powell, supra, 36 A.D.2d at 184, fn.).

Given the unreliability of this informant and the conclusory nature of his claims, the State, in order to establish probable cause, was required to corroborate independently the assertions of the informant that a drug mill was in fact operating in the apartment to be raided. Spinelli v. United States, supra; United States v. Harris, supra. Further, where, as here, neither prong of Aguilar has been satisfied, the Supreme Court requires that the corroboration obtained by the police must consist of information that the persons named are actually engaged in criminal activity. Confirmation of innocent behavior is insufficient. Whiteley v. Warden, 401 U.S. 560, 567 (1971). The Whiteley requirement is easily justifiable in light of Aguilar's emphasis on reliability. Aguilar requires a reliable informant who has a reliable method of collection or source of information. The reliable informant

must establish the reliability of the sources of his information in order to protect against the possibility that even he may be misled into reaching inaccurate conclusions by unreliable sources. Similarly, since it is the informant who himself reveals his sources of information, he must be shown to be a reliable individual in order to protect against the possibility that he may be misleading the police about his sources as well as his predictions.

Where, as in Draper v. United States, 358 U.S. 307 (1959), an informant is of established reliability but fails to establish the reliability of his sources, this deficit can be rectified if even innocent aspects of his predictions are actually seen by the police to take place. In that event, the reliability of his sources is thereby established, satisfying the first prong of the Aguilar test, and the police can rely on the informant's previously established reliability to assume that the criminal activity he predicted is in fact taking place, despite the fact that the police have not corroborated that part of his prediction themselves.

If, however, the informant is of unproven reliability or, as in this case, of proven unreliability, and has also failed to show that his sources were reliable, then the mere fact that certain innocent activities which he predicted do take place does not give the police probable cause to credit his prediction of criminal activity or to believe that he had reliable sources for that particular prediction. Unlike Draper,

where the informant's previous reliability was established, here there is no basis for believing that he is not fabricating or at least unreliable as to his prediction of criminal activity. Given this fact, the police cannot have probable cause to believe that the unreliable informant's prediction of criminal act.vitiy is accurate unless their observations are independently corroborative of the fact that such criminal activity, and not merely innocent activity, is occurring. Whiteley v. Warden, supra.

The total of the policemen's independent observations was that Massey, Bostick, and certain of their friends, some known to be past narcotics violators or "mill" girls, and some wearing men's clothing, entered an apartment belonging to one Tessie Truhart on January 23, 1970, and that Powell, an individual about whom the police had no knowledge whatsoever, drove up and after waiting for Massey, unloaded a suitcase, cardboard box, and shopping bag from the trunk of the car and took them into the apartment building. The police conceded that these items were in no way unusual or suspicious in appearance. Their claim that this constituted a "pattern" in drug cases is undercut by the fact that the unloading of such articles from a car trunk occurs hundreds of times a day on the streets of New York in the course of purely innocent activity. The police had observed no glassine envelopes, white powder, or drug paraphernalia. They had no reports from persons claiming either to have recently purchased or

to have made arrangements to purchase drugs from the individuals involved. They had no evidence of drug mill operations having previously occurred in the apartment in question. They had no predictions of criminal activity from any of the persons who were seen entering the apartment that morning. They had no evidence that any drugs had been taken into the apartment. Absent any of these factors or any other information indicating that activity of a criminal, as opposed to an innocent, nature was occurring inside the apartment, the police lacked probable cause to raid that apartment and arrest its occupants.

II

THE FAILURE OF THE POLICE TO OBTAIN A VALID WARRANT BEFORE RAIDING THE APARTMENT IN QUESTION INVALIDATED THE SEIZURE OF MATERIALS FOUND THEREIN.

In light of the fact that the search warrant obtained by the police was constitutionally void, the raid was in fact a warrantless search. However, the requisite "emergency" conditions which would relieve the police of their obligation to obtain a valid search warrant before their raid did not exist in this case.

The police had the apartment in question under surveillance for seven hours prior to the raid. The last of the observations on which the State bases its claim of probable cause was made at 10:30 a.m. However, the apartment was not

raided until 1:00 p.m. As the dissenting judges in the Appellate Division and the Court of Appeals held:

> Certainly two and one-half hours was more than sufficient time for the sophisticated New York City Police to obtain a valid warrant if the facts would support it.
>
> People v. Powell, supra, 36 A.D.2d at 187.

Since the premises were surrounded, there was no danger that any of the suspects would escape. Nor were any of them observed attempting to make such an escape. Moreover, since the suspects were unaware of the policemen's presence, there was no danger that they would attempt to destroy any of the drugs they were believed to possess during that period.

The Fourth Amendment requires not merely probable cause, but also a search warrant in order to validate a search and seizure. Absent convincing proof by the State that an emergency existed precluding the police from obtaining a warrant, their failure to do so rendered their raid unconstitutional and requires suppression of the evidence they seized. McDonald v. United States, 335 U.S. 451, 454-55 (1948).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and the writ of habeas corpus granted.

Respectfully submitted,

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Certificate of Service

Oct 1, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.